

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER DISABILITY
DECISION NO. 658 AS A PRECEDENT
DECISION PURSUANT TO SECTION
409 OF THE UNEMPLOYMENT
INSURANCE CODE.

In the Matter of:

SHIRLEY M RICE
(Claimant)

PRECEDENT
DISABILITY DECISION
No. P-D-381

FORMERLY DISABILITY DECISION No. 658
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S.S.A. No.

The claimant appealed to a referee from a determination issued by the Department of Employment which denied disability benefits commencing December 17, 1963 under the provisions of section 2626 of the Unemployment Insurance Code on the ground that the medical records in possession of the department indicated that the claimant was able to perform her regular and customary work. Subsequent to the issuance of Referee's Decision No. BN-D-4163, we set aside the referee's decision under section 1336 [now section 413] of the code.

STATEMENT OF FACTS

The claimant was employed as a licensed vocational nurse and a registered inhalation therapist by a hospital in the Los Angeles area from April 1962 until July 31, 1962 on a full-time basis. She thereafter left work in order to remain at home and care for personal matters.

In October 1962 the claimant returned to work with the same employer and worked on a part-time basis. Initially, she worked from two to three days per week; however, this part-time work was increased until she was working approximately four days per week. During the latter portion of her employment, her work was reduced and she averaged approximately 16 hours per week. The last week in which the claimant worked she earned wages

of \$31.84. She left this part-time work on or about June 30, 1963 upon the advice of her physician because she could no longer perform the duties of the job.

As an inhalation therapist, the claimant was required to set up various kinds of oxygen equipment and to attend patients who needed assistance in breathing. In some cases this would require the claimant to remain at the bedside of a patient for a long period of time and to maintain an exact position so as to properly administer to the patient. On occasion she would be required to administer artificial respiration. She would also have to change the oxygen cylinders which were used. The area in which the claimant worked was extensive and she was required to do a great deal of walking. Because of the type of equipment used and because of the condition of some of the patients, on occasions the claimant would have to quickly move to change the type of equipment used, depending upon the needs of the patient.

Under postmarked date of October 15, 1963, the claimant submitted a first claim for disability benefits to the San Bernardino District Disability Office of the Department of Employment. The doctor's certificate which accompanied this claim showed that the claimant had been under the doctor's care from May 6, 1963, and was disabled from July 1, 1963. The disability was diagnosed as "Spondylolisthesis with unstable L-S joint." The claimant's doctor estimated that she would be able to return to work on or about January 6, 1964. The department determined the claimant disabled and eligible for benefits, and such benefits were paid at the rate of \$40 a week commencing September 25, 1963 through December 16, 1963.

At the hearing the claimant submitted a letter dated February 3, 1964 and signed by her doctor in which he stated that because of the claimant's physical condition she was advised to leave her work and to consider changing her occupation.

At the request of the department, the claimant, on December 17, 1963, underwent a physical examination by a doctor selected by the department. In his report to the department dated December 23, 1963, the doctor stated that in his opinion the claimant was not disabled and could immediately return to her usual occupation. The

report does not show that the doctor was aware of the claimant's usual occupation or of the nature of her duties in her most recent employment.

Although the claimant was not asked specifically, it was implicit in her testimony that as of the date of the hearing on February 6, 1964 she was still disabled because of the condition of her right hip and lower back. She testified that the doctor selected by the department spent from three to five minutes examining her on December 17, 1963.

In the decision which we set aside, the referee denied disability benefits to the claimant commencing December 17, 1963 because he found that she remained out of the labor market after her unequivocal withdrawal from it on July 31, 1962. This conclusion was based apparently on the fact that she never engaged in full-time work although she did commence to work on a part-time basis in October 1962 and continued working on a part-time basis until the onset of her disability.

REASONS FOR DECISION

Section 140.5 of the Unemployment Insurance Code provides in part:

"140.5. 'Unemployment compensation disability benefits' or 'disability benefits' refers to money payments payable . . . to an eligible unemployed individual with respect to his wage losses due to unemployment as a result of illness or other disability resulting in such individual being unavailable or unable to work due to such illness or disability."

Section 2601-1(r) of Title 22 of the California Administrative Code provides:

"For the purposes of Section 140.5 of the code no individual shall be deemed eligible for disability benefits for any week of unemployment unless such unemployment is due to a disability. If an individual has been neither employed nor registered for work at a

public employment office or other place approved by the director for more than three months immediately preceding the beginning of a period of disability, he is not eligible for benefits unless the department finds that the unemployment for which he claims benefits is due to a disability and is not due to his previous withdrawal from the labor market."

We have denied benefits under this section of the California Administrative Code where the record disclosed that the claimant had withdrawn from the labor market for personal reasons prior to the onset of his disability on the ground that the unemployment for which he was claiming disability benefits was not caused by a disability but by his prior withdrawal from the labor market (Disability Decision No. 362).

In the instant case, the record is clear that the claimant did at one time withdraw from the labor market in order to remain at home. However, she returned to work and re-entered the labor market although on a part-time basis.

In Disability Decision No. 56 we stated that there is no provision in the act (now code) or regulation which requires that a claimant must have been employed on a full-time basis prior to the onset of a disability in order to qualify for disability benefits. We reiterated this principle in Disability Decision No. 264, and again hereby approve the principle and hold that it is unnecessary for a claimant to establish that he was employed on a full-time basis prior to the onset of his disability in order to be entitled to disability benefits.

We likewise hold that section 140.5 of the code does not require that the wage loss attributable to a disability must be a wage loss resulting from full-time employment. It is sufficient to show that the claimant is suffering a loss of wages due to unemployment which results from a disability.

That is the situation in this matter. The claimant, as a result of her disability, was required to leave employment and was suffering a wage loss due to unemployment caused by her disability.

Section 2626 of the code provides in part:

"2626. 'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which . . . he is unable to perform his regular or customary work"

In our opinion, in this specific case, it is unnecessary to decide whether the claimant's "regular and customary work" is on a full-time or part-time basis. The facts show that because of her disability she was unable to perform work as a licensed vocational nurse or the rather rigorous duties she performed on her last job as a registered inhalation therapist either on a part-time or full-time basis.

The final question for decision is whether the claimant's disability continued after December 17, 1963. The claimant's own doctor originally indicated that, in his opinion, the claimant would be able to return to work on or about January 6, 1964. However, he later indicated that the claimant should because of her physical condition, consider changing her occupation. The claimant's own testimony indicates that her disability extended beyond that date. The only evidence to refute this is the report of the doctor selected by the department in which he stated that the claimant could return to her usual occupation immediately. However, as we have previously found, the evidence does not show that the doctor was aware of the claimant's usual occupation or of the extent of her duties in her most recent employment. The claimant's testimony that his examination took no more than five minutes is unrefuted. Under these circumstances, we conclude that the weight of the evidence supports a finding that the claimant continued to be disabled on and after December 17, 1963, and that disability benefits are payable to her provided she is otherwise eligible.

DECISION

The determination of the department is reversed. Disability benefits are payable to the claimant after December 17, 1963, provided she is otherwise eligible.

Sacramento, California, May 28, 1964.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

GERALD F. MAHER, Chairman

LOWELL NELSON

NORMAN J. GATZERT

Pursuant to section 409 of the Unemployment Insurance Code, the above Disability Decision No. 658 is hereby designated as Precedent Decision No. P-D-381.

Sacramento, California, April 11, 1978.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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